IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.427 OF 2004

Dy.Chief Engineer, Western Railway. ... Petitioner.

vs.

M/s.R.P.Shah. .... Respondent.

Mr.Sureshkumar, for Petitioner.

Mr. D.D.Madan with U.S.Samudrala, for Respondent.

AND

ARBITRATION PETITION NO.86 OF 2005

M/s.R.P.Shah. .... Petitioner

Vs.

1.Union of India & others. ... Respondents

Mr. D.D.Madan with U.S.Samudrala, for Petitioner.

Mr.Sureshkumar, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 6th September,2005

P.C.:-

1. In both the petitions filed under Section 34 of the Arbitration and Conciliation Act,1996, the same Award made by the learned Arbitrator is challenged. The petitioner in Arbitration Petition no.427 of 2004 viz. the Deputy Chief Engineer, Western Railways challenges the Award made against Claim nos.2(1), 3, 5, 12, 13, 14, 15 and 17, and the petitioner in Arbitration Petition no.86 of 2005 viz. M/s.R.P.Shah challenges the Award made against claim nos.9 and 16. For the sake of convenience hereinafter the Deputy Chief Engineer, Western Railway is referred to as the "Petitioner" and M/s.R.P. Shah is referred to as the "Claimant"/"Contractor".

2. So far as the award against claim no.2(1) is concerned which is challenged by the petitioner, the learned Arbitrator has awarded Rs.1,07,184/- towards the cost of removing surplus excavated earth. The contractor has claimed amount of Rs.2,14,368/-. According to the contractor, the earth that was excavated for diversion of Nala was required to be carried by the contractor outside the boundary of Railway and for that he incurred expenses which were to be reimbursed to him. The case of the petitioner was that no earth was

carried outside the railway boundary and therefore, no amount could be awarded. Perusal of the findings recorded by the Arbitral Tribunal shows that the Arbitral Tribunal has rejected the case of the petitioner that no earth was carried outside the railway boundary by observing that because the Nala diversion was carried out after all the buildings had come up, no land was available for dumping of earth and therefore, it was carried outside the boundary of the railway. The Arbitral Tribunal has further observed that since how much earth was excavated and how much earth was removed is not measured by anybody, the Arbitral Tribunal has awarded 50% of the quantity claimed by the contractor. The submission of the petitioner is that this award has been made without considering the evidence on record. According to the petitioner, the finding that the earth was actually removed from the railway compound, could not have been recorded only because the work of nala diversion was done after the buildings had come up. The fact that the buildings had come up could not by itself prove that there was no land available for dumping the excavated surplus earth. According to the contractor, however, the contractor had produced documentary proof showing that the earth was actually carried outside the railway compound and the documents which were produced show how much earth carried outside. If in the light of these rival submission, the Award is perused, it becomes clear that the Arbitral Tribunal has not considered the material produced by the

contractor on record. In my opinion, the learned Arbitral Tribunal was under a duty to consider whether the earth was actually carried outside the railway compound, by referring to the evidence which might have been produced on record by the contractor. The finding that the earth was removed out of the compound of the railway could not have been recorded on the basis of inference. In any case, only because the excavation was done after the buildings had come up within the railway compound the arbitral tribunal could not have concluded that the earth was carried outside the compound. In my opinion, it was for the contractor to establish it by leading evidence and it was for the Arbitral tribunal to consider as to how and where the said earth was carried away? and how much expenditure was incurred? I find that the Award made by the learned Arbitrator in this regard is made without considering any evidence and therefore, it is liable to be set aside. Even if, the submission of the learned Counsel appearing for the contractor that the contractor had produced the evidence is accepted, then also the Award clearly shows that the Arbitral Tribunal has not considered the evidence produced by the Contractor and has passed the Award without application of mind to that evidence. Therefore, the award made by the learned Arbitral Tribunal against claim no.2(1) is liable to be set aside. It is accordingly set aside.

3. The next challenge by the petitioner is in respect of Award

against claim no.3. As per the Award, an amount of Rs.8,44,240/- has been awarded against the claim of revised rates for excess quantities. Perusal of the Award shows that the Arbitral Tribunal has awarded the amount at revised rates for the extra work done. It is submitted by the petitioner that this could not have been done because the contractor had entered into an agreement dated 10.2.2000 thereby agreeing to do the work at the same rate. However, it is submitted that the Arbitral Tribunal has recorded the finding that the first variation agreement cannot be relied on because it is vitiated by fraud and is unsustainable. The learned Counsel for Respondent on the other hand submitted that the Arbitral Tribunal has held that the first variation agreement cannot be relied on because the items included in the first variation agreement were deleted in second variation agreement. Perusal of the Award however shows that the Arbitral Tribunal has recorded the finding that the first variation agreement/statement was vitiated by the fraud played by the petitioner, only because the contractor refused to sign the second variation agreement. In my opinion allegation of fraud is a serious allegation which is required to be pleaded by giving particulars and to be proved by leading evidence. Thus, the finding recorded by the Arbitral Tribunal that the first variation statement is vitiated by fraud, in my opinion, cannot be sustained. If that finding cannot be sustained then the first variation statement is binding on the parties and the Award made agaisnt this claim is clearly contrary to

the first variation statement and therefore, the Award made against claim no.3 is in my opinion, clearly vitiated and is liable to be set aside. It is accordingly set aside.

4. Further, the petitioner challenges the Award made against claim no.5. According to the petitioner, there was no justification for the Arbitral Tribunal to make deduction at the rate of 5% when the agreed rate of deduction was 16%. I do not find any substance in this challenge. Admittedly, the contractor has carried out the work of 150 cum. and under the terms of contract the deduction was 16% and therefore, he would be entitled to payment of 94 cum., because the Abitral Tribunal has allowed the deduction of 5% on 100 cum. which was the measurement after passing of one monsoon the contractor gets payment for 95 cum. In my opinion therefore, it cannot be said that the Award deserves to be set aside.

5. The next challenge is to the Award made against the claim nos. 12,13 and 14. Under these claims the amounts for under-utilisation of overheads, labour force and the machinery were claimed. It is submitted on behalf of the petitioner that no amounts could have been awarded against these claims because while granting extension it was made clear that the extension would be granted under clause 3, 17 (a)(i) and 17(B) of the General conditions of the Contract and by letter

dated 5.1.2001 the Contractor has undertaken to do the work during the extended period at the same rates, terms and conditions of the Contract. Perusal of the Award shows that though in the reply filed to the statement of claim the petitioner had specifically stated that the extension was given on the contractor agreeing not to claim damages, and do the work on the same rates, terms and conditions, the Arbitral Tribunal has totally ignored that aspect of the matter and has made the Award. Hence, the Award made against the claim nos.12,13, 14 is liable to be set aside. It is accordingly, set aside.

6. The next challenge is to the Award made against the claim no.15. In my opinion, this challenge is not well founded because the reply filed to the Statement of claim by the petitioner shows that the petitioner had relied on clause no.24 of the Contract. But there is no provision in the contract which shows that the petitioner is empowered to deduct the amount of tax under the Works Contract Tax. Therefore, I do not find any fault with the Arbitrator in making the award against this claim.

7. The last challenge is to the Award made against claim no.17. It was contended that while awarding cost, the relevant clause in the Contract has not been considered by the Arbitral Tribunal. However, perusal of the reply filed before the Arbitral Tribunal shows

that no clause in the contract was relied on by the petitioner. Therefore, that challenge cannot be accepted.

8. On behalf of the contractor the Award made against claim no.9 is challenged on the ground of non application of mind by the learned Arbitrator. It is submitted that the contractor was claiming amount of Rs.12 lakhs towards the loss of profit and that claim has been denied by the Arbitral Tribunal after recording the findings that the termination of the contract was not proper, on the ground that he has been awarded compensation for the work done. In my opinion, the challenge deserves to be upheld. The contractor was claiming loss of profit for the work which he could not do due to wrongful termination of the contract. That the contractor has been awarded the amount for the work done by him, cannot be the justification for not granting amount on account of loss of profit which was caused due to not permitting the contractor to do the balance work after the date of termination of the Contract. The award made in this regard, is therefore, set aside.

9. On behalf of the contractor, the Award made against claim no.16 is also challenged. The claim no.16 was for awarding interest. The challenge is that the Arbitral tribunal has denied this claim of interest relying on clause 64(5) of the General Conditions of the

Contract. It is submitted that the general condition no. 64.5 of G.C.C.1998 was neither referred to nor relied on by the petitioner in the reply filed to the statement of claim. The case of the contractor is that the clause 64.5 is not applicable. In any case, I find that there are no pleadings on behalf of the petitioner to claim as to how the provision of clause 64.5 are attracted. In my opinion, while deciding the claim relying on the provisions of clause 64.5 of GCC 1998, the arbitrator was under a duty to consider as to how the provisions of clause 64(5) are applicable. The Award in this regard is therefore, liable to be set aside. In the result, therefore, both the petitions succeeds. The Award made against claim nos.2(1), 3, 9, 12.13, 14, 16 is set aside.

There shall be no order as to costs.